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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
BILL O'BRIEN & SONS)
CONSTRUCTION COMPANY and)
SUMMIT WESTERN, INC.,)
Appellants,)
v.)
PUGET SOUND AIR POLLUTION)
CONTROL AGENCY,)
Respondent.)

PCHE Nos. 85-168 and 85-169
FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of two notices and orders of civil penalties totaling \$1,500 for allowing an outdoor fire containing prohibited materials, came on for hearing before the Pollution Control Hearings Board; Gayle Rothrock, Lawrence J. Faulk (presiding), and Wick Dufford, on December 13, 1985, at Seattle, Washington. Respondent Agency elected a formal hearing. Lynn Tarry, court reporter of Calmes and Associates, recorded the proceedings.

Appellants were represented by William L. O'Brien, owner of

1 O'Brien & Sons Construction Company, Inc. Respondent Puget Sound Air
2 Pollution Control Agency was represented by its counsel Keith D.
3 McGoffin.

4 Witnesses were sworn and testified. Exhibits were admitted and
5 examined. Argument was heard. From the testimony, exhibits, and
6 contentions of the parties the Board makes these

7 FINDINGS OF FACT

8 I

9 Respondent, Puget Sound Air Pollution Control Agency (PSAPCA),
10 pursuant to RCW 43.21B.260, has filed with the Board a certified copy
11 of its Regulation I, of which we take judicial notice.

12 II

13 On June 7 and June 12, 1985, appellant companies caused or allowed
14 a large outdoor fire containing demolition debris and natural
15 vegetation at a construction site at Casino Road and Hardeson Road in
16 Everett, Washington.

17 III

18 The fires in question may have started as land clearing fires, but
19 included rubber and composition roofing material. A loader and dump
20 truck were on the site. The prohibited materials caused the fire to
21 emit dense black smoke. Photographs of the fire were taken on the
22 days in question.

23 IV

24 An inspector from respondent Agency visited the site in response
25 to a citizen complaint on June 7, 1985, at approximately 8:45 a.m.,

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1 and made observations of the fire. The fire was approximately 60 feet
2 in diameter and 10 feet high.

3 On June 12, 1985, at approximately 11:50 a.m., the same inspector
4 on routine patrol noticed a column of black smoke from the same
5 locale. Fifteen minutes later he arrived at the scene and made
6 personal observations of the fire. The observations included opacity
7 readings. He recorded the opacity of the smoke at 100 percent for
8 eight consecutive minutes.

9 V

10 The inspector checked the agency file and discovered that a
11 Population Density Verification (PDV) had been issued by PSAPCA for
12 the site in January 1985. This document, which identified Summit
13 Western as the property owner, verified the population density within
14 .6 of a mile as less than 2,500 persons. In such an area, land
15 clearing burning, as defined, may be conducted under PSAPCA's rules
16 without further approval from that agency. However, the PDV plainly
17 stated the following condition:

18 The outdoor fires must not contain any material other
19 than trees, stumps, shrubbery or other natural
vegetation which grew on the property being cleared.

20 The inspector also determined that Bill O'Brien and Sons
21 Construction, Inc., had obtained an outdoor burning permit from the
22 Everett Fire Department for the site.

23 VI

24 On June 7, 1985, Notice of Violation (No. 20859) was issued to
25 appellants for violating Section 8.02(3) of PSAPCA Regulation I on

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1 that date.

2 VII

3 On July 16, 1985, Notice and Order of Civil Penalty No. 6298 was
4 sent to appellants assessing a penalty of \$500 for allegedly violating
5 PSAPCA Regulation I, Section 8.02(3) on June 7, 1985. From this,
6 appellant appealed to this Board on August 21, 1985, the appeal
7 becoming our PCHB No. 85-168.

8 VIII

9 On July 15 and July 24, 1985, Notices of Violation (Nos. 20860 and
10 20801) were personally served on appellants for violating Section
11 8.02(3), 8.02(5) and 9.03(b) of PSAPCA Regulation I and WAC
12 173-400-040(1), on June 12, 1985.

13 IX

14 On July 16, 1985, Notice and Order of Civil Penalty No. 6299 was
15 sent to appellants assessing a penalty of \$1,000 for allegedly
16 violating PSAPCA Regulation I, Section 8.02(3), 8.02(5) and 9.03(b)
17 and WAC 173-400-040(1) on June 12. From this, appellant appealed to
18 this Board on August 21, 1985, the matter becoming our cause number
19 PCHB No. 85-169.

20 X

21 Mr. O'Brien explained that this was a three-acre site being
22 cleaned up prior to development. The area contained a large amount of
23 junk. He testified that extensive efforts had been made by this
24 employees to clear the site of debris which had been deposited there
25 over the years. The wreckage of an old house, eighteen cars, washers,

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1 tires, dryers, scrap iron and other miscellaneous junk had been hauled
2 to the dump. This effort entailed approximately 60 truckloads of
3 debris.

4 XI

5 The fires were intended to consist solely of natural vegetation.
6 Nonetheless, because of the large amount of discarded material on the
7 overgrown site, Mr. O'Brien conceded the possibility that some tires
8 or roofing debris might inadvertently have been buried in the burn
9 pile.

10 He theorized that the darkness and opacity of the smoke might have
11 been the result of spreading the embers of a dying fire. However,
12 PSAPCA's inspector, a man of a dozen years of experience in matters of
13 this kind, insisted that the smoke was of a type which would not
14 result absent the presence of petroleum or rubber products in the
15 fires. As shown in our Findings II and III, above, we find that, in
16 fact, such materials were in the fires.

17 XII

18 Nothing in this record connects Summit Western, Inc., to the fires
19 in question other than the fact of their ownership of the land.

20 XIII

21 Over 15 years of operation in PSAPCA's area, appellant O'Brien &
22 Sons has received no prior civil penalties. Normal company practice
23 is to haul demolition debris away for appropriate disposal, not to
24 burn it on site in connection with land clearing. Employees are
25 instructed that only natural vegetation may be burned. Subsequent to

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1 June 12, 1985, there have been no further events like the instant
2 cases.

3 XIV

4 Any Conclusion of Law which is deemed a Finding of Fact is hereby
5 adopted as such.

6 From these Findings of Fact the Board comes to these

7 CONCLUSIONS OF LAW

8 I

9 The Board has jurisdiction over these persons and these matters.
10 Chapters 43.21B and 70.94 RCW.

11 II

12 The Legislature of the State of Washington has enacted a strict
13 policy on outdoor burning.

14 It is the policy of the state to achieve and maintain
15 high levels of air quality and to this end to
16 minimize to the greatest extent reasonably possible
17 the burning of outdoor fires. Consistent with this
18 policy, the legislature declares that such fires
19 should be allowed only on a limited basis and under
20 close control. RCW 70.94.740.

21 Respondent PSAPCA has adopted its Regulation I, Section 8.02 which
22 provides in relevant part:

23 It shall be unlawful for any person to cause or allow
24 any outdoor fire:

25 (3) containing garbage, dead animals, asphalt,
26 petroleum products, paints, rubber products, plastics
27 or any substance which normally emits dense smoke or
obnoxious odors.

28 Appellant O'Brien & Sons' failure to maintain a regular land
29 clearing fire, free of prohibited materials, violated Section 8.02(3)

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1 of Regulation I, on June 7 and June 12, 1985.

2 III

3 Regulation I, Section 9.03(b) and WAC 173-400-040(1) further
4 disallow the emission of air contaminants which exceed 20 percent
5 opacity for more than three minutes in any one hour. We conclude
6 appellant O'Brien & Sons violated this opacity standard, on June 12,
7 1985.

8 IV

9 Because we have found violations supporting penalties for the
10 conduct on the dates in question, we do not here consider whether the
11 same conduct violated Regulation I, Section 8.02(5). To do so would
12 require our consideration of the permit issued by the Everett Fire
13 Department. We prefer to leave enforcement of such matters to the
14 issuing agency.

15 V

16 We conclude that O'Brien & Sons was responsible for the fires. On
17 the record, we conclude that Summit Western had no involvement in the
18 burning and did not "cause or allow" it.

19 VI

20 The Washington Clean Air Act and PSAPCA's implementing rules
21 impose a standard of strict liability for the violations at issue.
22 The violator's intentions are irrelevant to whether the law was
23 broken. However, such matters may be considered in evaluating the
24 amount of penalty imposed.

25
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VII

Appellant O'Brien & Sons has a respectable record of compliance with PSAPCA regulations over the past fifteen years. The instant violations were not the result of conscious choice. Indeed, the evidence indicates a substantial effort to comply with the rules. Penalties should be fashioned which recognize the prior good record and take into account the efforts to prevent a recurrence, but which also promote long-term compliance with air pollution regulations. Under all the circumstances the Order set forth below is appropriate.

VII

Any Finding of Fact which is deemed a Conclusions of Law is hereby adopted as such.

From these Conclusions of Law the Board enters this


ORDER

Notices and Orders of Civil Penalties Nos. 6298 and 6299 are reversed as to Summit Western and affirmed as to O'Brien & Sons Construction, Inc.; provided however that \$1,000 is suspended on condition that the company not violate respondent's regulations for a period of one year from the date of issuance of this Order.

DONE this 10th day of January, 1986.

POLLUTION CONTROL HEARINGS BOARD

 1/10/86
LAWRENCE J. FAULK, Chairman


WICK DUFFORD, Lawyer Member


GAYLE ROTHROCK, Vice Chairman